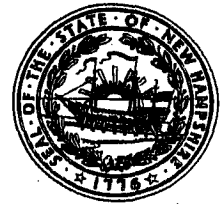




The State of New Hampshire
Department of Environmental Services
Water Council



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STATE OF NEW HAMPSHIRE
WATER COUNCIL

Docket No. 03-10 WC

Appeal of The Conservation Law Foundation
In Re: Water "Falls Way Subdivision" Water Quality Certificate No. 2003-001

Decision & Order

Background

On August 18, 2003, the Conservation Law Foundation ("Appellant") filed a petition for appeal, of the Department of Environmental Services, Water Division's ("DES") issuance of Water Quality Certificate No. 2003-001 to Endicott General Partnership ("Applicant"), with the NH Water Council ("the Council").

On June 30, 2005 the Appellant filed a *Memorandum of Law in Support of "Ground I" of its Notice of Appeal* ("the Appellant's memorandum") with the Council. In the Appellant's memorandum the Appellant argues that DES had no legal authority to act upon and issue a Section 401 Water Quality Certificate because the Department's Section 401 water quality regulations (N.H. Admin. R. Env-Ws 451-455), had expired, and because it lacked statutory authority to act in the absence of rules.

On July 1, 2005 DES filed a *Legal Memorandum of Department of Environmental Services on the Impact of the Expired Procedural Rules* ("the DES memorandum"). In the DES memorandum, DES argues that section 401 of the Clean Water Act ("CWA") reserves significant legal authority to the states with respect to federal permitting actions that may affect state waters. DES persuasively argues that DES' authority to issue water quality certificates arises under state law, not federal law, and that New Hampshire had adopted water quality standards prior to the adoption of the CWA in 1972. DES argued that RSA 485-A:8 sets the

standards for classification of surface waters of the state, including specific bacteria and pH limitations for class A and B waters, and gives the state authority to adopt water quality standards. RSA 485-A:8, I, II and VI. RSA 485-A:12 (formerly RSA 14:8, I and II) gives DES authority to enforce the classifications it has adopted for surface waters of the state, and the power to make a certification as to whether the standards have been met is necessarily contained in the power to adopt and enforce the standards. DES argues that the NH Supreme Court has concluded that a 401 certification is an action taken under state law, not federal law. Town of Sutton v. Water Supply and Pollution Control Commission, 116 N.H. 154 (1976). DES further argues that the water quality standards, not the expired procedural rules, contain the real substantive standards applicable to water quality certifications. Furthermore, "Promulgation of a rule pursuant to RSA chapter 541-A is not necessary to carry out what a statute authorizes on its face." Smith v. N.H. Board of Examiners of Psychologists, 138 N.H. 548, 553 (1994).

The State issued certifications prior to promulgation of its procedural rules in 1995 and has the same powers now.

Ruling

For reasons cited above, and for other reasons cited in the DES Memorandum, the Council denies the Appellant's assertion that DES lacked authority to issue the 401 Water Quality Certificate.

So Ordered for the Council by: _____

COPY
Michael P. Schiavari, Appeals Clerk

October 28, 2005